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In The

Supreme Court of the United States

October Term, 1997

VICKY LEWIS and GARY LEWIS, individually, as parents, as next friends, and as administrators of the Estate of Kathryn C. Lewis,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("the Advisory Council") is a nonprofit corporation with 125 corporate members from a broad cross-section of American industry.[2] It was formed for the principal purpose of submitting *amicus curiae* briefs to assist courts in the sound development of product liability law.

The Advisory Council's members include many manufacturers whose products are regulated under federal laws that seek to promote product safety and consumer welfare by ensuring a certain amount of national uniformity in the design and performance standards those products are required to meet. The briefs submitted by Petitioners and their *amici* include arguments that (a) sweep so broadly as to undermine several of those federal laws, (b) conflict with important principles of preemption and statutory construction, and (c) would, if accepted, impede product safety and harmfully burden the free flow of commerce with improper state law impediments. Accordingly, although it supports Respondent in urging affirmance of the judgment below for the reasons stated in the Brief of Respondent, the Advisory Council's primary interest here is to ensure that certain of

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. Pursuant to Rule 37.3 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A list of the members of *Amicus Curiae* Product Liability Advisory Council, Inc. is attached as Appendix A.

the erroneous arguments made by Petitioners and their *amici* do not obstruct the sound development of preemption principles or the proper interpretation and application of preemption provisions in this and other cases.

SUMMARY OF THE ARGUMENT

The preemption provision of the Boat Safety Act by its terms applies when any state seeks to establish or enforce any "law or regulation" establishing a safety standard or imposing a requirement for recreational vessels or associated equipment. That language, both on its face and when interpreted in a manner consistent with the decisions of this Court, applies to all forms of state law, including common-law standards and requirements as well as statutory and regulatory standards and requirements.

The "saving clause" of the Boat Safety Act does not limit the scope of the preemption provision; rather, it negates compliance with federal regulations as an affirmative defense. The language of the saving clause refers only to the effect of "compliance," which is irrelevant to a preemption analysis, and it makes no mention of either preemption or federal supremacy. It also uses language that differs demonstrably from the anti-preemption language commonly employed by Congress in saving clauses that actually are intended to restrict the preemptive scope of federal statutes.

The structure of the Boat Safety Act further shows that the saving clause was not intended broadly to

exempt common-law claims from the preemption provision's coverage. The preemption provision specifies the only exceptions that limit its scope, and the saving clause, which appears in an entirely different part of the Act, is not one of them.

The legislative history of the Act still further confirms that the saving clause was not intended to preclude the preemption of common-law claims that would impede the goal of national uniformity of boat safety standards. Congress considered and rejected an explicit request to add a provision that would have "made it clear that this Act does not preempt state or common law."

ARGUMENT

I. THE PREEMPTION PROVISION OF THE BOAT SAFETY ACT APPLIES TO STANDARDS AND REQUIREMENTS IMPOSED BY STATE TORT LAW, REGARDLESS OF WHETHER THE STATE TORT LAW IS STATUTORY OR COMMON LAW

Petitioners and their *amici* have argued that the Boat Safety Act's preemption provision, section 4306, does not apply to standards and requirements imposed by common law. (*See* Pet. Br. 24-28;[3] TLPJ Br. 17-20;[4] U.S. Br. 17-21.[5]) They are wrong.

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[3] Citations to "Pet. Br." are to the Brief of Petitioners.

[4] Citations to "TLPJ Br." are to the Brief of *Amicus Curiae* Trial Lawyers for Public Justice, P.C., in Support of Petitioners.

[5] Citations to "U.S. Br." are to the Brief for the United States as *Amicus Curiae* Supporting Petitioners.

As this Court repeatedly has stated, the task of construing a preemption provision "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). *Accord Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996). Here, the "plain wording" of the Boat Safety Act's preemption provision encompasses standards and requirements imposed by *all* state law, which includes common law as well as state statutes and regulations. The statute declares:

> Unless permitted by the Secretary under section 4305 of this title, *a State* or political subdivision of a State *may not establish, continue in effect, or enforce a law* or regulation *establishing* a recreational vessel or associated equipment performance or other *safety standard or imposing a requirement* for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306 (emphasis added).

The core language identifying the types of state action preempted is "law or regulation establishing a . . . safety standard or imposing a requirement. . . . " Because it says "*law* or regulation," not "*statute* or regulation," it provides no basis for reading "law" to mean only "statute" and to exclude common law. This Court has too often declared that "the phrase 'state law' . . . include[s]

common law as well as statutes and regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992). *See, e.g., Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *Erie R.R. v. Tompkins*, 304 U.S. 64, 71, 79 (1938).

Petitioners and their *amici* ignore those decisions, making no attempt to distinguish them. Instead, Petitioners and their *amici* point to other language in the preemption provision, to other provisions of the Boat Safety Act, and to the absence of an explicit reference to "common law" in section 4306 in an effort to show that Congress really meant "statute" when it said "law" in section 4306. The effort is unavailing.

Petitioners and their *amici* first contend that section 4306 does not encompass common law because "the pre-emption clause does not provide that 'common law' actions are pre-empted. Congress has repeatedly shown its ability to expressly refer to 'common law' when it intends to include it within the scope of a pre-emption clause." (Pet. Br. 24-25 (citing Copyright Act of 1976, 17 U.S.C. § 301(a) (1977), and Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (1989), as preemption provisions containing the term "common law." *Accord* TLPJ Br. 19).) That argument proves both too much and too little.

It proves too much because section 4306 not only omits an explicit reference to "common law," but likewise omits any explicit reference to "statutes" or "legislative enactments." Therefore, if it were correct that a preemption provision applies only to forms of state action that it

narrowly and specifically names, section 4306 would not preempt statutes, either. But Petitioners and their *amici* in fact concede that section 4306 does apply to "legislative . . . actions" or "legislative . . . enactments." (Pet. Br. 25, 27. *Accord* U.S. Br. 18 n.9; TLPJ Br. 19.)

Cipollone further confirms that the use of the phrase "law or regulation," rather than the phrase "statute or regulation," in the Boat Safety Act's preemption provision indicates Congress' intent to preempt something more than positive enactments. The Court stated:

> [W]hile the version of the 1969 Act passed by the Senate pre-empted "any State *statute or regulation* with respect to advertising or promotion . . . , the Conference Committee replaced this language with "State *law* with respect to advertising or promotion." In such a situation, § 5(b)'s pre-emption of "state law" cannot fairly be limited to positive enactments.

Cipollone, 505 U.S. at 523 (emphasis in original). In short, the broader word "law" generally encompasses both statutory law and common law, and Congress can achieve broad preemption by using that encompassing word, rather than having to list the various kinds of laws.

In addition, Petitioners undermine their own argument by pointing to the preemption provisions of the Copyright Act of 1976 and the Domestic Housing and International Recovery and Financial Stability Act ("Domestic Housing Act") to support their contention that Congress "has repeatedly shown its ability to expressly refer to 'common law' when it intends to include it within the scope of a pre-emption clause." (Pet. Br. 24-25.) Both of those preemption provisions explicitly

refer to "statute" or "statutes" as well as to "common law." Thus, the very provisions on which Petitioners rely prove that Congress has shown its ability "to expressly refer" to "statutes" every bit as much as it has shown its ability "to expressly refer" to "common law." If, as Petitioners argue, the omission of an explicit reference to "common law" in the Boat Safety Act's preemption provision were to mean that common-law standards and requirements cannot be preempted, then the omission of an explicit reference to "state statutes" likewise would mean that statutory standards and requirements could not be preempted either. Since Petitioners and their *amici* concede that state statutory standards and requirements can be preempted (*see, e.g.*, Pet. Br. 25, 27; U.S. Br. 18 n.9; TLPJ Br. 19), the Copyright Act and the Domestic Housing Act do not support Petitioners' argument; instead, they further show that the argument proves too much.

Petitioners' argument proves too little because it fails to distinguish, and in fact contradicts, the many cases in which this Court has held that preemption provisions omitting explicit reference to "common law" can nevertheless preempt common-law standards and requirements. *See, e.g., Medtronic*, 116 S. Ct. at 2262, 2263 (O'Connor, J., Rehnquist, C.J., Scalia & Thomas, J.J., concurring in part and dissenting in part) ("requirements" in Medical Device Amendments of 1976 encompasses common law); *id.* at 2259 (Breyer, J., concurring in part and concurring in the judgment) (same); *Easterwood*, 507 U.S. at 664 ("law, rule, regulation, order, or standard" in Federal Railroad Safety Act of 1970 encompasses common law); *Cipollone*, 505 U.S. at 522 ("requirement or prohibition" in Public Health Cigarette Smoking Act of 1969

encompasses common law, and "state law" encompasses common law); *Norfolk & W. Ry.*, 499 U.S. at 128 ("all other law" in Interstate Commerce Act encompasses common law); *Illinois v. City of Milwaukee*, 406 U.S. at 100 ("laws" in 28 U.S.C. § 1331(a) encompasses common law); *Erie R.R. v. Tompkins*, 304 U.S. at 71, 79 ("laws of the several States" in Federal Judiciary Act of 1789 encompasses common law).

Moreover, those cases belie Petitioners' contention that " 'laws, regulations, and requirements' are all terms which connote legislative or executive decision-making processes, as opposed to common law liability." (Pet. Br. 25. *Accord* TLPJ Br. 19.) Each of those cases involved a federal statute using either "laws" or "requirements," and in each of those cases this Court interpreted the word to encompass common-law standards or requirements.

Cipollone is especially instructive. The preemption provisions at issue there were in the Federal Cigarette Labeling and Advertising Act ("the 1965 Act") and the Public Health Cigarette Smoking Act of 1969 ("the 1969 Act"). The preemption provision of interest here is that of the 1969 Act, which stated:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334(b). As is evident, that preemption provision made no mention of "common law," but instead contained only the phrase "no requirement or prohibition." Nevertheless, this Court held that the provision

expressly preempted a variety of common-law claims, as well as regulations and statutes.

In explaining why the 1965 Act, unlike the 1969 Act, did not preempt common-law claims, the Court emphasized that the 1965 Act stated that its purpose was only to prevent nonuniform "regulations":

> This reading comports with the 1965 Act's statement of purpose, which expressed an intent to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising *regulations* with respect to any relationship between smoking and health." . . . [T]he term "regulation" most naturally refers to positive enactments by those bodies [of legislatures and agencies], not to common law damages actions.

Cipollone, 505 U.S. at 519 (emphasis in original). The Court then noted that, in contrast, the 1969 Act's preemption provision was *not* expressly limited to "regulations," but instead addressed state "requirements and prohibitions," and therefore preempted common-law claims as well as regulations:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply "statements" but rather "requirement[s] or prohibition[s] . . . imposed under State law."

Id. The Court then further explained:

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law

> rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Id. at 521 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

Cipollone's preemption analysis is equally applicable here. The Boat Safety Act's preemption provision expressly encompasses not only state "regulation[s]," but state "law[s]," that "establish[ ] . . . performance or other safety standard[s]" or "impos[e] . . . requirement[s]." 46 U.S.C. § 4306. Because, as stated in *Cipollone*, " 'regulation' " most naturally refers to positive enactments" by legislatures and agencies, the word "law" in the phrase "law or regulation" should be read to include common law; otherwise, "law or regulation" would be redundant.

Also, like the 1969 Act's phrase "requirement or prohibition," the Boat Safety Act's phrases "law or regulation," "performance or other safety standard," and "requirement" are terms that, especially as a group, "sweep[ ] broadly and suggest[ ] no distinction between positive enactments and common law," and "easily encompass obligations that take the form of common-law rules." *Cipollone*, 505 U.S. at 521. And it is as true here as it was in *Cipollone* that the intent of the preemption provision would be thwarted if the provision were held inapplicable to common-law standards and requirements, because "[t]he obligation to pay compensation can be,

indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.*

The use of the word "standard" in section 4306 is especially telling, and the Solicitor General is quite wrong in asserting that " 'standard' 'would not ordinarily be thought to include duties of care that derive from the process of common-law adjudication.' " (U.S. Br. 17 (quoting U.S. Amicus Br., No. 94-286, at 13).) Indeed, the Solicitor General employs exactly that usage by elsewhere stating, "[U]nder one reading of the saving clause, a common-law claim would be permitted . . . unless that *claim propounded a standard of conduct* directly contrary to the federal rule." (U.S. Br. 27 (emphasis added).)

More importantly, for decades this Court has explicitly referred to common-law rules as "state safety standards" or "state standards." *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to "state safety standards" set by California product liability common law); *International Paper Co. v. Ouellette*, 479 U.S. 481, 496 n.17 (1987) (noting "possibility that [the defendant] will have to meet a number of different standards" if sued under different states' common law); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (referring to "imposition of a state standard in a damages action"); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959). Thus, the Court repeatedly has confirmed that the ordinary meaning of "standards," when referring to legal standards, includes judicial, as well as regulatory and statutory, standards.

Petitioners and their *amici* attempt to circumvent those cases by arguing that in the Boat Safety Act "the term 'standard' refers to regulatory standards the Coast Guard may enact under section 4302 [and it] is a bedrock principle of statutory interpretation that 'a word is presumed to have the same meaning in all subsections of the same statute.' " (Pet. Br. 26. *Accord* U.S. Br. 18; TLPJ Br. 18.) But that argument misapplies the presumption on which it relies.

First, the preemption provision, section 4306, does not refer only to "regulations" that establish "standards"; rather, it refers more broadly to any "law or regulation establishing a . . . safety standard or imposing a requirement. . . . " Since section 4302 refers only to "regulations establishing . . . standards," the portion of section 4306 that refers to any *"law or* regulation establishing a . . . standard *or imposing a requirement"* must be read to encompass something more than regulations that establish regulatory standards. Specifically, it must encompass "laws" that "establish[ ] standards" and "laws" that "impos[e] a requirement," where "laws" means something other than the "regulations" that are expressly referred to in tandem with, and thus are distinct from, "laws" in section 4306.[6]

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[6] The Solicitor General argues that section 4306's reference to " *'a* law or regulation . . . *imposing* a requirement' . . . is more naturally read to refer only to state positive law imposing prescriptive requirements. . . . " (U.S. Br. 18 n.9 (emphasis in U.S. Br.).) Not so. In *Cipollone* this Court held common-law standards encompassed by a preemption provision that spoke only of " 'requirement[s] or prohibition[s] . . . *imposed under* State law.' " *Cipollone*, 505 U.S. at 521 (emphasis added). *See CSX Transp. Inc.*

In addition, Petitioners themselves concede that the mere fact that the word "standard," as used in section 4302 and some other provisions, refers to standards established by Coast Guard regulations does not mean that "standard," as used in section 4306, refers solely to standards established by regulations. Specifically, Petitioners and their *amici* explicitly assert that in section 4306 "Congress intended the term 'standard' to refer to state *legislative or* administrative enactments. . . . " (Pet. Br. 26-27 (emphasis added). *Accord* U.S. Br. 18; TLPJ Br. 19.) Thus, Petitioners and their *amici* admit that "standard," as used in section 4306, cannot properly be interpreted to mean only standards established by regulations.

Petitioners and their *amici* are also incorrect in arguing that common-law standards established by the courts of a state are not established by a "State or political subdivision of a state." (Pet. Br. 26; U.S. Br. 11, 18-19; TLPJ Br. 19-20.) As shown above, this Court repeatedly has referred to common-law tort standards as *"state* safety standards" and *"state* standards." (*See* cases cited at p. 11, *supra*.)

Moreover, in *Cipollone* this Court explicitly rejected the argument that common-law standards established by state courts are not obligations or requirements

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v. Easterwood, 507 U.S. 658, 664 (1993) (finding express preemption of "[l]egal duties *imposed . . . by* the common law") (emphasis added); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (holding common-law claims impliedly preempted because "[a] system under which each State could, *through its courts, impose* . . . its own . . . *requirements* could hardly be more at odds with the uniformity contemplated by Congress") (emphasis added).

" 'imposed under State law.' " *Cipollone*, 505 U.S. at 521. The Court noted:

> At least since *Erie R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), we have recognized the phrase "state law" to include common law as well as statutes and regulations.

Id. And in *Medtronic* the preemption provision that a majority of the Court held applicable to common-law standards used the identical phrase used in the Boat Safety Act – "State or political subdivision of a State" – to describe the bodies or entities whose requirements were preempted by federal law under the Medical Device Amendments of 1976. Thus, the Boat Safety Act's preemption of actions by a "State" to establish or enforce a "standard" or "requirement" includes actions by state courts, as well as actions by state legislatures and agencies.

The Solicitor General also argues that "State" must not include a state's judiciary because section 4306 contains an exception that permits a state, "in the absence of the Secretary's disapproval, [to] regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State." Specifically, the Solicitor General argues that this must be so because "state judicial officers do not petition the Secretary of a federal department for permission to proceed with a state lawsuit." (U.S. Br. 11. *Accord id.* 18-19.)

That is a *non sequitur*. The exception merely describes certain circumstances in which a state may "regulate" certain boating activities; it does not say that a state may "establish, continue in force, or enforce a law" under

those circumstances. Thus, the exception by its terms applies only to the "regulation" portion of the preemption provision, not to the "law" portion. Because, as this Court stated in *Cipollone*, " 'regulation' most naturally refers to positive enactments by [legislatures and agencies]," the exception's use of the word "regulate" in connection with the exception that requires approval of the federal agency plainly indicates that the exception applies only to state legislative and administrative action, not to judicial actions covered by the word "law" in the preemption provision.[7]

The Solicitor General next argues that because 46 U.S.C. section 4302(a) authorizes the Secretary to "prescribe regulations establishing minimum safety standards," Congress must have intended the federal requirements to be only a "floor with respect to safety measures that manufacturers must adopt," not a ceiling

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[7] TLPJ asserts that "no one would ordinarily describe an award of damages by a jury or judge as being *issued* by a 'State or political subdivision of a State.' " (TLPJ Br. 20 (emphasis added).) But section 4306 does not speak in terms of laws, standards, or requirements "issued" by a state; rather, it speaks in terms of laws, standards, or requirements "establish[ed], continue[d] in effect, or enforce[d]" by a state, and it is quite common to describe common-law standards as being established or enforced by the courts.

Similarly, TLPJ asserts that "it is impossible to say that a *federal* jury or judge is in any sense a 'State or political subdivision thereof.' " (TLPJ Br. 20 (emphasis in original).) But it is not at all unusual, much less impossible, to say that a federal judge has enforced common-law standards established by the courts of the state whose substantive law the federal court is applying under diversity jurisdiction.

limiting the states' power to impose more stringent requirements. (U.S. Br. 20-21.) But that argument suffers from two fatal flaws.

First, the argument suggests that the safety standards adopted by the Secretary were intended to establish only a floor because of their "minimum" nature and that Congress wanted to leave the states free to require manufacturers to meet more stringent standards. That, however, is not an argument that supports an interpretation of section 4306 that would preempt state statutes and regulations, but not state common law; rather, it is an argument that would support omitting a preemption provision from the Boat Safety Act. Obviously, Congress rejected that route.

Second, the argument suggests that, by using the word "minimum" in section 4302, Congress meant that the safety standards to be promulgated by the Secretary were to provide only minimum safety, but section 4302 cannot properly be so construed. Immediately after authorizing the Secretary to prescribe "regulations establishing minimum safety standards," the statute states that each standard must "meet[ ] the need for recreational vessel safety." The latter language shows that the standards are required to meet the need for vessel safety, not merely to provide some minimal, inadequate level of safety that has to be supplemented by the states. Properly understood, therefore, the word "minimum" simply means that manufacturers cannot legally sell recreational vessels that fail to comply with the standards established by the Secretary's regulations. *Cf.* 46 U.S.C. § 4307 (prohibiting the manufacture, construction, assembly, sale, offer for sale, delivery, or importing of any recreational

vessel, associated equipment, or component thereof that fails to comply with "a regulation prescribed under this chapter").

The First Circuit has reached exactly this conclusion with respect to the identical "minimum standards" language in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1391, recodified at 49 U.S.C. § 30102(a)(9). The court stated: "Although the standards are 'minimum' in the sense that a manufacturer may make a vehicle safer than required by federal law, the standards are not 'minimum' in relation to state law." *Wood v. General Motors Corp.*, 865 F.2d 395, 414 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). Moreover, the Secretary has likewise stated of that statute:

> The word "minimum" in the statutory definition of motor vehicle safety standards . . . does not refer to the substantive content of the standards but rather to their legal status – that the product covered must not fall short of them.

41 Fed. Reg. 3291, 2392 (Jan. 16, 1976). For the same reason, the word "minimum" in the Boat Safety Act cannot properly be given the meaning "minimal" suggested by the Solicitor General.

Finally, as a simple matter of common sense and sound statutory interpretation, section 4306 cannot reasonably be interpreted to preempt substantive tort standards established by statutes and not to preempt substantive tort standards established by common law. Suppose, for example, that (1) the Georgia state courts had held for years that the common law in Georgia established no duty on the part of boat manufacturers to install some type of anti-tip mechanism to prevent boats

from tipping over, *cf., e.g., Delvaux v. Ford Motor Co.*, 764 F.2d 469, 473-74 (7th Cir. 1985) (applying common law of Wisconsin and holding that, as a matter of law, a convertible automobile is not unreasonably dangerous because of the absence of a roll bar); (2) in 1997 the Georgia Legislature enacted a statute legislatively overruling that decision and providing that plaintiffs could sue boat manufacturers in tort for damages arising out of accidents involving boats without anti-tip mechanisms; (3) the Alabama state courts, like the Georgia state courts, also had held for years that the common law established no duty to install anti-tip mechanisms on boats; and (4) in 1997 the Alabama Supreme Court held that Alabama common law had changed and had come to impose a duty to install anti-tip mechanisms in boats. Under these assumptions, Petitioners and their *amici* could not argue that plaintiffs bringing suits in either state in 1998 would be "asking a federal district court to allow the application of the forum's long-standing common law." (Pet. Br. 26. *Accord* TLPJ Br. 19.) Nevertheless, under the preemption interpretation advocated by Petitioners and their *amici*, plaintiffs in Alabama could sue in tort to enforce the newly-established common-law duty, but plaintiffs in Georgia could not sue in tort to enforce the newly-established statutory duty. Given the substantial amount of tort law that has been codified in various states in recent years, this is hardly a far-fetched hypothetical. *See, e.g.*, Ala. Code §§ 6-5-500 *et seq.*; La. Code §§ 2800.52 *et seq.*; Tenn. Code Ann. §§ 29-28-101 *et seq.* Congress cannot reasonably be thought to have intended such disparate treatment of plaintiffs based solely on whether the duty

sought to be enforced has its origin in a state statute or instead in a state's common law.

II. 46 U.S.C. SECTION 4311(g) DOES NOT LIMIT THE SCOPE OF THE BOAT SAFETY ACT'S PREEMPTION PROVISION, BUT INSTEAD NEGATES COMPLIANCE WITH FEDERAL REGULATIONS AS AN AFFIRMATIVE DEFENSE

Petitioners and their *amici* argue that "Congress expressly preserved common law from pre-emption by including it in the savings clause [section 4311(g)]." (Pet. Br. 30. *See* U.S. Br. 11; TLPJ Br. 20.) In fact, however, section 4311(g) does *not* expressly refer to preemption. Instead, its language, whether considered alone, considered together with the language of section 4306, considered in light of the Boat Safety Act's statutory structure, or considered in light of the legislative history, shows that section 4311(g) does not limit the preemptive scope of section 4306 at all; rather, section 4311(g) negates compliance with federal standards or regulations as an affirmative defense.

Section 4311(g) states, "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." It does not mention preemption, federal supremacy, or the Supremacy Clause. Also, unlike section 4306, which was enacted, and still appears, under the title "Federal preemption," it was enacted under the title "Saving Clause" and now appears under the title "Penalties and injunctions." *Compare* 85 Stat. 217 (1971) *and* 46 U.S.C. § 4306 *with* 85 Stat. 228

(1971) *and* 46 U.S.C. § 4311(g). *See generally I.N.S. v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (title of a statute or section can aid in resolving ambiguity in legislation's text).

Not only does the language of section 4311(g) not refer in any way to preemption or federal supremacy, but it differs demonstrably from the language commonly employed by Congress in saving clauses that are intended to restrict the preemptive scope of a federal statute. Virtually every preemption-limiting saving clause interpreted by this Court in the last several decades has contained language that is clearly anti-preemptive and is wholly unlike that used in section 4311(g). *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) (interpreting saving clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (interpreting saving clause of Federal Aviation Act of 1958, 49 U.S.C. § 1506, which states, "Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies"); *Cipollone*, 504 U.S. at 518 (referring to saving clause of Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406(c), which states, "Nothing in this Act shall relieve any person from liability, under common law or under State statutory law, to any other person"); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (interpreting saving

clauses of 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-7 and 2000h-4; the first of these provided, "Nothing in this title shall be deemed to exempt or relieve any person from any liability . . . provided by any present or future law of any State. . . . "; the second stated, "Nor shall any provision of this Act be construed as invalidating any provision of State law"); *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978) (interpreting saving clause of 1958 Disclosure Act, 29 U.S.C. § 301, which states, "The provisions of this Act . . . shall not be held to exempt or relieve any person from any liability . . . provided by any present or future law of . . . any State"), *aff'd*, 444 U.S. 911 (1979); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210 (1986) (interpreting saving clause of Death on the High Seas Act, 46 U.S.C. § 767, which states, "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Chapter.").

This stark difference between the affirmative-defense "compliance with" language of section 4311(g) and the preemption-limiting language regularly employed by Congress in other statutes cannot be ignored. As this Court has emphasized, "Normal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ." *Offshore Logistics*, 477 U.S. at 222.

The "compliance with" language of section 4311(g) in fact would be quite inconsistent with a preemption-limiting interpretation. To determine whether or not federal law preempts an asserted state law, a court does not even ask whether a defendant complied with a federal standard; rather, the court (1) examines the state law asserted by the plaintiff to have been violated, (2) examines the

federal law asserted by the defendant to be preemptive, and (3) determines whether the asserted state law either is encompassed by the federal preemption statute or conflicts with the federal purposes and policies. *If* the federal preemption provision does not encompass the asserted state law, and *if* there is no conflict between the federal and state laws, there is no preemption; *then* the case may go forward, and *then* the defendant may seek to prove compliance with the federal law and argue either that such compliance constitutes a defense or that the evidence of compliance at least may be considered by the jury. By providing that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law," section 4311(g) precludes the use of compliance as a complete defense *at trial* and ensures that evidence of compliance will have only its traditionally limited role as evidence that the jury may consider in determining the reasonableness of the defendant's conduct.[8]

The legislative history of section 4311(g) strongly supports this interpretation. It was added as an amendment by the Senate after the following request was made by Richard Schwartz, Executive Director of the Boat Owners Association of the United States:

> [W]e would recommend a savings provision with respect to the consumers' private remedies,

[8] A state court could still conclude that, as a matter of state policy, compliance should be a complete defense. Section 4311(g) *permits* a state court to reach that conclusion, but expresses Congress' intent not to mandate it.

> which is not touched upon by the present Bill. *We would like to see it explicitly clarified that compliance with standards issued under the Act does not relieve the manufacturers from liability under State or common law in private law suits. It should be made clear that this Act does not preempt state or common law.*

National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 88 (1971) (emphasis added). Despite having received an explicit request for a provision to ensure that compliance would not be a defense *and* a provision to ensure that the Boat Safety Act would not preempt state or common law, Congress chose to include a preemption provision, to omit any language that would have "made it clear that this Act does not preempt state or common law," and to act favorably only on that part of the request aimed at compliance as a defense.

In describing the purpose of the amendment, the Senate Report made it even clearer that the focus was on the effect of compliance evidence, not on the scope of preemption. The report stated:

> The purpose of the section is to assure that in a product liability suit *mere compliance* by a manufacturer with the minimum standards promulgated under the Act *will not be a complete defense* to liability. Of course, depending on the rules of evidence of the particular judicial forum, *such compliance may or may not be admissible for its evidentiary value.*

S. Rep. No. 92-248, 92d Cong., 1st Sess. 32 (1971), *reprinted in* 1972 U.S. Cong. & Admin. News 1333, 1352 (emphasis

added). This statement of purpose explicitly aims to negate "mere compliance" as "a complete defense," and to permit states to allow the admissibility of compliance evidence. It has nothing to do with preemption.

There is still another aspect of the language of section 4311(g) that is inconsistent with the argument of Petitioners and their *amici*. The statute states that compliance "does not relieve a person from liability at common law *or under State law*." As discussed above, however, Petitioners and their *amici* have argued that the conjunction of "State" and "law" in section 4306 must be interpreted to preempt state legislative and administrative laws (*see* pp. 4-6, *supra*), and that the same meaning must be given to words wherever they appear in the Boat Safety Act (*see* pp. 12-13, *supra*). Under that argument, therefore, "State law" in section 4311(g) would have to be interpreted to mean "state statutes and regulations," and section 4311(g) would preserve from preemption all state common law, all state statutes, and all state regulations. The "saving clause" would swallow, not limit, the preemption provision. Plainly, that is too absurd to have been Congress' intent.

Finally, the interpretation of sections 4306 and 4311(g) advanced by Petitioners and their *amici* ignores this Court's admonition that, in interpreting an express preemption provision like section 4306, "[e]vidence of pre-emptive purpose is sought in the text *and structure* of the statute at issue." *Easterwood*, 507 U.S. at 664 (emphasis added). *Accord Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98-99, 112 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). The structure of the Boat Safety Act, like the language itself, shows that section 4311(g)

was never intended to be the sweeping exception to section 4306 that Petitioners and their *amici* claim it to be.

Section 4311(g) appears five full sections after what is undeniably the preemption provision, section 4306, and section 4311(g) does not refer back to section 4306 in any way. In fact, the two sections as originally enacted were 30 sections apart. *See* 85 Stat. 217, 228 (1971). That structural fact alone suggests that section 4311(g) does not address preemption and was not intended to limit section 4306.

In addition, section 4306 itself contains saving language that does clearly limit the preemptive scope in two ways. First, section 4306 explicitly permits the states to establish, continue in effect, or enforce any law or regulation "that is . . . identical to a regulation prescribed under section 4302 of this title." Second, section 4306 explicitly permits any state to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," as long as the Secretary has not disapproved the regulatory action. This additional structural fact suggests that, if Congress had intended section 4611(g) to constitute a third – and by far the most sweeping – exception to the preemption provision, Congress would have included the language of section 4311(g) in its logical place, adjacent to the two saving clauses explicitly stated in the preemption provision itself.

Thus, the statutory structure of the Boat Safety Act, like its text and legislative history, shows that section 4311(g) was never intended to address preemption and

was never intended to create a sweeping exception to section 4306.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
CORPORATE MEMBERS

3M

ACRISON, Inc.

Allegiance Healthcare Corporation

Allied Signal, Inc.

Aluminum Company of America

American Automobile Manufacturers Assn.

American Brands, Inc.

American Home Products Corporation

American Suzuki Motor Corp.

Andersen Corporation

Anheuser-Busch Companies

Atlantic Richfield Company

BASF Corporation

Baxter International, Inc.

Bayer Corporation

Becton-Dickinson & Company

Beech Aircraft Corporation

BIC Corporation

Black & Decker (U.S.) Inc.

BMW of North America, Inc.

Boeing Company, The

Bridgestone/Firestone, Inc.

Briggs & Stratton

Bristol-Myers Squibb Company

Brown-Forman Corporation

Budd Company, The

C.R. Bard, Inc.

Caterpillar, Inc.

CBI Industries, Inc.

Chrysler Corporation

Ciba-Giegy Corporation

Clark Material Handling Company

Coleman Company, Inc., The

Continental General Tire, Inc.

Coors Brewing Company

Corning Incorporated

Daewoo Motor America

Dana Corporation

Deere & Company

Dow Chemical Company, The

E. & J. Gallo Winery

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Estee Lauder Companies

Exxon Corporation, U.S.A.

FMC Corporation

Ford Motor Company

Freightliner Corporation

Gates Rubber Company, The

General Electric Company

General Motors Corporation

Glaxo Wellcome Co.

Goodyear Tire & Rubber Company, The

Great Dane Trailers, Inc.

Guidant Corporation

Harnischfeger Industries Inc.

Heil Company, The

Hoechst Celanese Chemical Group, Inc.

Hoechst Marion Roussel, Inc.

Honda North America, Inc.

Hyandai Motor America

International Paper Company

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Kaiser Aluminum & Chemical Corporation

Kawasaki Motors Corp., U.S.A.

Kolcraft Enterprises, Inc.

Kraft Foods, Inc.

Loewen Group International, Inc.

Lorillard Tobacco Company

Lucent Technologies Inc.

Mack Trucks, Inc.

Maytag Corporation

Mazda (North America), Inc.

Medtronic, Inc.

Melroe Company

Mercedes-Benz of N. America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motors R. & D. of America, Inc.

Monsanto Company

Motorola, Inc.

Navistar International Transportation Corp.

Nissan North America, Inc.

O.F. Mossberg & Sons, Inc.

Otis Elevator Co.

Owens-Corning Fiberglas Corporation

PACCAR Inc

Panasonic Company

Pentair, Inc.

Pfizer Inc

Pharmacia and Upjohn, Inc.

Philip Morris Companies, Inc.

Porsche Cars North America, Inc.

Procter & Gamble Co., The

Raymond Corporation, The

RJ Reynolds Tobacco Company

Rover Group, Ltd.

Schindler Elevator Corp.

Sears, Roebuck & Company

Shell Oil Company

Sherwood, a Division of Harsco Corporation

Siemens Energy & Automation, Inc.

Smith & Nephew Richards, Inc.

SmithKline Beecham Corporation

Snap-on Incorporated

Sofamor Danek Group, Inc.

Sturm, Ruger and Co., Inc.

Subaru of America

Textron, Inc.

Thomas Built Buses, Inc.

Toro Company, The

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Westinghouse Electric Corporation

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.